(10)

No. 96-6867

In The

Supreme Court of the United States

October Term, 1996

JOSEPH ROGER O'DELL, III,

Petitioner,

v.

J.D. NETHERLAND, Warden, Mecklenburg Correctional Center; RONALD J. ANGELONE, Director, Virginia Department of Corrections; JAMES S. GILMORE, III, Attorney General of the Commonwealth of Virginia; COMMONWEALTH OF VIRGINIA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF OF PETITIONER

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March 12, 1997

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21 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES – Continued

Page(s)

STATUTES

MISCELLANEOUS

ARGUMENT IN REPLY

I.

THE COMMONWEALTH FAILS TO SHOW THAT *SIMMONS* ANNOUNCED A NEW RULE

A. The Commonwealth Wrongly Minimizes the Force of *Gardner* and *Skipper*

The Commonwealth seeks to demonstrate that the plurality opinion in *Simmons* was wrong in saying that the decisions in *Gardner* and *Skipper* "compel[led]" the *Simmons* result. It is true, as the Commonwealth argues, *see* Brief of Respondents ("Resp. Br.") 16, that the *Simmons* plurality's use of the verb "compel" is not dispositive; but it is powerful evidence of what reasonable jurists would have thought before *Simmons* was decided.[1] *See Yates v. Aiken*, 484 U.S. 211, 217 (1988) (relying on the language of this Court's decision as evidence that it did not announce a "new rule"). The verb "compel" is not one that the Members of this Court use carelessly. Our research discloses only four criminal cases (including *Simmons*) in the last forty years in which either a majority or plurality of the Court said that a decision was "compelled" by precedent. *See Simmons v. South Carolina*, 512 U.S. 154, 165 (1994) (plurality opinion); *Doyle v. Ohio*, 426 U.S. 610, 617 (1976); *United States v. Hale*, 422

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[1] Contrary to the Commonwealth's suggestion, we of course do not argue that the issue here is "whether a court reasonably could have fashioned the *Simmons* rule" or that "if [O'Dell] can prove that *Simmons* stated a reasonable position, then he is entitled to its benefits." Resp. Br. 13, 11. We agree with the Commonwealth that the issue is whether reasonable jurists "in essence, should have seen *Simmons* coming." Resp. Br. 15.

U.S. 171, 176 (1975); *Gerstein v. Pugh*, 420 U.S. 103, 117 (1975).[2]

In arguing that *Gardner* and *Skipper* did not compel the *Simmons* result, the Commonwealth seeks to show, in substance, that *Gardner* and *Skipper* were confusing cases with multiple opinions that a reasonable jurist would have had trouble understanding. Resp. Br. 17-24. But *Gardner* and *Skipper* were not confusing, though the Commonwealth labors long and hard to make them so. Their due process holdings were perfectly clear, and the conclusion that they compelled the *Simmons* result was inescapable to any reasonable jurist who considered the issue.

In looking for confusion and ambiguity in *Gardner*, the Commonwealth simply miscounts the votes, finding only four for *Gardner*'s due process holding and thus concluding that a reasonable jurist could have believed *Gardner* to be only an Eighth Amendment case. Resp. Br. 20. In fact, five Members of the Court agreed in *Gardner*

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[2] The Commonwealth contends that it is a mistake to "equate[] Justice O'Connor's use [in the *Simmons* concurrence] of the word 'requires' with 'compels' " because the word is used simply as a "restatement" of the "due process holding" of *Skipper*. Resp. Br. 16 n. 6. It is true that the concurrence was restating the *Skipper* holding, but the word "requires" was supplied by the *Simmons* concurrence. The *Simmons* concurrence states that where the prosecution relies on a prediction of future dangerousness in asking for the death penalty, the due process principle of *Gardner* and *Skipper* "*requires* that the defendant be afforded an opportunity to introduce evidence on this point." *Simmons*, 512 U.S. at 175 (O'Connor, J., concurring in the judgment) (citing *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986), and *Gardner v. Florida*, 430 U.S. 349, 362 (1977)) (italics added).

that the sentencing proceeding there violated the Due Process Clause. *See Gardner*, 430 U.S. 349, 362 (1977) (plurality opinion of Stevens, J., joined by Stewart and Powell, JJ.); *id.* at 364 (opinion of Brennan, J.); *id.* at 365 (Marshall, J., dissenting). Moreover, the Court's due process holding was not specifically limited to "secret reports:"

> We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.

Id. at 362 (plurality opinion). There was nothing obscure about the *Gardner* holding.

The due process holding in *Skipper* was unanimous and crystal clear. Footnote 1 of the majority opinion in *Skipper*, joined by six Justices, states:

> Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of *Lockett* and *Eddings* that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362, 97 S. Ct. 1197, 1207, 51 L.Ed.2d 393 (1977).

Skipper v. South Carolina, 476 U.S. 1, 5 n.1 (1986).

In the face of this language, it would have been impossible for a reasonable jurist to conclude, as the Commonwealth suggests, that *Skipper* was "limited to an

Eighth Amendment violation." Resp. Br. 23. It is true that the due process holding was stated in a footnote, but this is apparently because the due process aspect of *Skipper*, in contrast to the Eighth Amendment aspect, was neither difficult nor controversial. The concurring opinion of Justice Powell, joined by Chief Justice Burger and then-Justice Rehnquist, expressly stated the concurring Justices' agreement with the majority's footnote 1 – the only part of the majority opinion with which the concurrence did agree. *Skipper*, 476 U.S. at 9-10 (Powell, J., concurring in the judgment). It is hard to imagine a less confusing case than *Skipper* on the due process issue.

The Commonwealth argues that a reasonable jurist in 1988 would have understood the *Skipper* due process holding as limited to the precise facts of *Skipper* – an attempt by a capital defendant to rebut an accusation of future dangerousness by presenting evidence of prior good conduct in prison. Resp. Br. 23. But, as noted above, the *Skipper* Court did not state its holding so narrowly, and the Commonwealth suggests no good reason why such a narrow reading would have been reasonable. The Commonwealth does not and cannot suggest any coherent argument that would distinguish the facts present in *Simmons* and here – an attempt by a capital defendant to rebut an accusation of future dangerousness by presenting evidence that he will in fact be confined for the rest of his life – from the *Skipper* facts. *See Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring in the judgment) (a decision does not announce a "new rule" if it "simply applie[s] a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case

law"). "[C]losely analogous" is a precise description of the relationship between the *Skipper* facts and those present in *Simmons* and here. *See also id.* at 308 (Kennedy, J., concurring in the judgment) (*Teague* does not bar "the application of an old rule in a novel setting").

A reasonable jurist in 1988 would not have failed to apply the rule of *Gardner* and *Skipper* to the *Simmons/O'Dell* situation. To see this clearly, suppose that *Simmons* itself had never been decided; suppose that today's legal landscape were identical with that of 1988. O'Dell's case would then present the question whether the prosecutor's conduct here – arguing to the jury that O'Dell was intolerably dangerous whenever paroled, while barring O'Dell from informing the jury that he could never *be* paroled – is reconcilable with the plain words of footnote 1 in *Skipper*. The answer to that question is no, and that answer would be apparent to any reasonable jurist.

B. The Commonwealth Misinterprets *Ramos*

The Commonwealth's attempt to obscure the significance of *Gardner* and *Skipper* is matched by its equally strained attempt to tease out of *Ramos* an endorsement of the practice condemned in *Simmons*.

The Commonwealth understandably does not assert, as did the court of appeals majority, that in light of *Ramos* reasonable jurists in 1988 would have thought it "all but a certainty that the rule of *Simmons* was not only not compelled, but forbidden." 95 F.3d at 1231-32. (J.A. 258.) The Commonwealth does maintain, however, that in *Ramos* this Court offered "***express approval*** of Virginia's rule."

Resp. Br. 27 (bold italics in original); *see also id.* at 7, 28 n.11.

This argument relies entirely on the following language in *Ramos*:

> Our conclusion is not intended to override the contrary judgment of state legislatures that capital sentencing juries in their States should not be permitted to consider the Governor's power to commute a sentence.[30] It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires. . . .
>
> [30] *See, e.g.*, Ga. Code Ann. § 17-8-76 (Michie 1982) (prohibiting argument as to possibility of pardon, parole, or clemency). Many state courts have held it improper for the jury to consider or to be informed – through argument or instruction – of the possibility of commutation, pardon, or parole. . . .

California v. Ramos, 463 U.S. 992, 1013 & n.30 (1983).

According to the Commonwealth, the effect of these "broad statements of deference . . . simply cannot be overstated." Resp. Br. 29. But it can be, and the Commonwealth does overstate it, considerably. This language comes nowhere near to "express approval" of "Virginia's rule" preventing a defendant from informing a capital sentencing jury of his parole ineligibility to rebut the prosecution's claim of future dangerousness. The language refers neither to future dangerousness, to the right of rebuttal, nor to parole *ineligibility* – a much more significant and unambiguous fact than the "possibility" of parole. It simply recognizes that, as the Court also said

in *Ramos*, the States have discretion to forbid discussion of possible post-conviction procedures, including parole, so long as they "do[] not violate any of the substantive limitations this Court's precedents have imposed on the capital sentencing process." *Ramos*, 463 U.S. at 1013; *see also id.* at 1001 ("Beyond the[] limitations . . . noted above, the Court has deferred to the State's choice of substantive factors relevant to the penalty determination. In our view, the Briggs Instruction does not run afoul of any of these constraints.").

Ramos itself identified the most obvious of these "substantive limitations" – the right of rebuttal recognized in *Gardner* – and carefully explained why the Briggs Instruction did not violate it. *Id.* at 1001, 1004. Thus, neither the language cited by the Commonwealth nor anything else in *Ramos* could have been thought to constitute "approval" of Virginia's practice of forbidding a capital defendant from rebutting a claim of future dangerousness by informing the jury that he is ineligible for parole.

The Commonwealth contends that *Ramos* recognized a right of rebuttal only where the jury is instructed by the court about the defendant's possible post-conviction release. According to the Commonwealth, *Ramos*

> simply held that, if the State elects to go down California's path [of permitting some instruction on post-conviction procedures], it must make sure (1) the instruction is accurate and (2) the defendant is not put in a position, like *Gardner*, where he has no opportunity to rebut the instruction's impact. A reasonable reading in 1988 of *Ramos'* discussion of *Gardner* is that if a

> State elects the safe path of not allowing any instruction on the issues of pardon or parole, *it need not worry about* Gardner's *requirement of rebuttal at all.*

Resp. Br. 28 n.11 (italics added). Far from "[a] reasonable reading" of *Ramos*, this is a nonsensical one – at least where, as here, the jury is led, not by instruction but by evidence and argument, to believe that the defendant will return to the community. In such a case, no reasonable jurist would have thought that a State's refusal to instruct the jury on post-conviction procedures could make *Gardner* a dead letter or obviate the defendant's need to "deny or explain" the State's evidence of future dangerousness. It is absurd to suggest that *Ramos* could validate what happened in the present case – where the prosecution repeatedly and vividly brought "parole" to the jury's attention and raised in closing argument the specter of O'Dell's potential violence "outside of the prison system," *see* Brief of Petitioner ("Pet. Br.") 2-3, and O'Dell was not permitted to inform the jury that his parole would be prohibited.

C. The Commonwealth Distorts the Lower Court Precedents

The Commonwealth again distorts the legal landscape of 1988 when it suggests that then-extant lower court decisions would have justified a reasonable jurist in upholding as constitutional the practice condemned in *Simmons*. Resp. Br. 34. The Commonwealth says that "the cases upholding the specific practice as constitutional were abundant." Resp. Br. 34. But the Commonwealth overlooks the fact that the "specific practice" at issue in

Simmons was the concealment from the jury "where the defendant's future dangerousness is at issue" of the fact that "state law prohibits the defendant's release on parole." *Simmons*, 512 U.S. at 156. This "specific practice" did not have the approval of appellate courts in any jurisdiction, except Virginia, at or after the time O'Dell's conviction became final.[3]

The only decision of the Virginia Supreme Court *prior* to the date O'Dell's conviction became final that is even arguably on point is *Poyner v. Commonwealth*, 329 S.E.2d 815, 836 (Va.), *cert. denied*, 474 U.S. 865 (1985). A reasonable jurist could not, however, have relied on *Poyner* because it was decided prior to *Skipper*, and because it was poorly reasoned. *Poyner* relied exclusively on dicta in

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[3] *Simmons* noted that only three states had a life-without-parole sentencing alternative to capital punishment, but refused to inform sentencing juries of that fact: South Carolina, Pennsylvania and Virginia. *Simmons*, 512 U.S. at 168 n.8 (plurality opinion). The South Carolina Supreme Court did not uphold this practice as constitutional in *Simmons*. Rather, it held – erroneously, as this Court later determined – that Simmons's jury had effectively been informed that he faced life without parole. *See State v. Simmons*, 472 S.E.2d 175, 178-79 (S.C. 1993), *rev'd*, 512 U.S. 154 (1994). The Pennsylvania Supreme Court did not address the precise *Simmons* issue because, under Pennsylvania law, future dangerousness is not a permissible aggravating factor. *See* 42 Pa. Cons. Stat. § 9711(d). A fourth state, Illinois, had abandoned the practice of refusing to disclose to the jury the possibility of life without parole prior to the time O'Dell's conviction became final. *See People v. Gacho*, 522 N.E.2d 1146 (Ill.), *cert. denied*, 488 U.S. 910 (1988). *Gacho*, while not precisely on point, foreshadowed *Simmons* by recognizing the unfairness of frightening jurors with the specter of a defendant's possible release, without disclosing that the defendant faced life without parole.

Hinton v. Commonwealth, 247 S.E.2d 704, 706 (Va. 1978) – a non-capital case in which the Virginia Supreme Court reversed the defendant's conviction because of the trial judge's error in attempting to explain Virginia's parole practice to the jury. In short, prior to the time O'Dell's conviction became final, there was no reasoned precedent anywhere contrary to the *Simmons* holding.

The lower-court decisions the Commonwealth relies on at pages 34-38 of its brief would have furnished a reasonable jurist in 1988 with no basis for reaching a result contrary to that in *Simmons*. Indeed, all of those decisions, apart from the Virginia Supreme Court decisions, are still, at least arguably, good law today – nearly three years after *Simmons* was decided.

Thus, *Turner v. Bass*, 753 F.2d 342 (4th Cir. 1985), *rev'd*, 476 U.S. 28 (1986), the first of the lower court decisions relied on by the Commonwealth, did not involve a defendant who was ineligible for parole. The defendant sought an instruction that he would be eligible for parole when "the prisoner's release will serve his interests and the interests of society." *Id.* at 353. *Simmons*, which expressly addresses only the situation where parole is prohibited by law, does not on its face overrule *Turner*. Similarly, *O'Bryan v. Estelle*, 714 F.2d 365 (5th Cir. 1983), *cert. denied*, 465 U.S. 1013 (1984), involved a defendant who would have been eligible for parole. The same was true in *King v. Lynaugh*, 850 F.2d 1055, 1062 (5th Cir. 1988) (eligible for parole after 20 years), *cert. denied*, 488 U.S. 1019 (1989); *Peterson v. Murray*, 904 F.2d 882, 886 (4th Cir.) (same), *cert. denied*, 498 U.S. 992 (1990); *Knox v. Collins*, 928 F.2d 657, 660 (5th Cir. 1991) (same). *United States v. Chandler*, 996 F.2d 1073, 1085-86 (11th Cir. 1993), *cert. denied*, 512 U.S. 1227 (1994), involved the federal sentencing scheme, under which the judge determines an alternative sentence only after the jury decides not to impose the death sentence. It may also be noted that *Turner* and *O'Bryan* were decided before *Skipper*, and so could not have led a reasonable jurist to believe that *Skipper* did not govern the *Simmons/O'Dell* situation;[4] and of the remaining cases the Commonwealth cites at pages 34-35 of its brief, all but *King* were decided after O'Dell's conviction became final, and so at that date could not have enlightened a reasonable jurist at all.

II.

THE COMMONWEALTH FAILS TO SHOW THAT THE SECOND *TEAGUE* EXCEPTION IS INAPPLICABLE

The Commonwealth contends that, so long as "Virginia's practice in 1988 was not erroneous or unreasonable" in light of then-existing precedent, whether it was "shocking" from the perspective of simple and basic fairness "simply has no place in an analysis of the *Teague* exceptions." Resp. Br. 45. The whole point of the second *Teague* exception, however, is that, even if a rule is "new,"

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[4] *See Spreitzer v. Peters*, 1996 WL 48585 (N.D. Ill. Feb. 5, 1996), holding that the *Simmons* rule was not new in light of *Skipper*, and distinguishing *Stewart v. Lane*, 70 F.3d 955, 958 n.3 (7th Cir. 1995), *supplementing*, 60 F.3d 296 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 2580 (1996), on the ground that the conviction in *Stewart* became final prior to *Skipper*. *Id.* at *4-*6. The *Stewart* court also noted this distinction, 60 F.3d at 302 n.4, but the Commonwealth overlooks it in saying that *Spreitzer* is "contrary to" *Stewart*. Resp. Br. 41 n.12.

it may nevertheless implicate "the fundamental fairness and accuracy of the criminal proceeding," *Saffle v. Parks*, 494 U.S. 484, 495 (1989), and "seriously diminish[]" "the likelihood of an accurate conviction," *Teague v. Lane*, 489 U.S. 288, 311-13 (1989), such that it ought to be applied to final state-court convictions.

The Commonwealth dismisses the "primacy and centrality" of the *Simmons* rule because it provides only "an additional defense to the State's argument" of future dangerousness, and "an additional measure of protection against error." Resp. Br. 46-47. The Justices who decided *Simmons*, however, had a different view. As noted in the *Simmons* concurrence, "the fact that he will never be released from prison will often be the *only* way that a violent criminal can successfully rebut the State's case" of future dangerousness. *Simmons*, 512 U.S. at 177 (O'Connor, J., concurring in the judgment) (italics added). Where the prosecution seeks to establish the defendant's future dangerousness, no rule could have more "primacy and centrality" than the *Simmons* rule.

III.

THE *SIMMONS* ERROR WAS NOT HARMLESS

The Commonwealth argues that the *Simmons* error at O'Dell's trial was harmless, claiming that it had no "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). The "burden" of showing harmlessness is on the Commonwealth in the sense that if the Court is in grave doubt about the effect of the error, the error is not harmless. *O'Neal v. McAninch*, 115 S. Ct. 992, 994 (1995).

The Commonwealth makes, in substance, two separate harmless error arguments. It says that (1) the jury's verdict on future dangerousness was unaffected by the *Simmons* error, and (2) the future dangerousness verdict was itself superfluous because the jury also found "vileness." Neither argument is sound.

A. The Verdict on Future Dangerousness Was Affected by the *Simmons* Error

The Commonwealth obviously did not think at the time of trial that the jury's fear that O'Dell might be paroled was "harmless" to O'Dell; the prosecution stressed the subject heavily, with the obvious purpose of doing O'Dell as much harm as possible. The Commonwealth claims that the prosecution "did not 'dwell' on O'Dell's parole history," Resp. Br. 49, but does not explain why it was necessary to use or elicit the words "parole" and "release" seventeen times in the sixteen pages of O'Dell's cross-examination. *See* Pet. Br. 2 & n.1. Nor does the Commonwealth explain, or even mention, the prosecutor's rhetorical question in closing argument: "Isn't it interesting that he is only able to be *outside of the prison system* for a matter of months to a year before something has happened again?" (J.A. 61) (italics added).

The Commonwealth argues that "O'Dell's prosecutor did not need to argue the threat of parole" because of O'Dell's "record of murder behind bars." Resp. Br. 49. The hypocrisy of this argument is blatant. In his closing argument, the prosecutor recounted in terrifying detail O'Dell's crimes *outside* of prison, but did not mention even once that O'Dell had been convicted in 1965 for

killing a fellow inmate. The prosecutor obviously knew what both common sense and empirical evidence confirm: nothing frightens a capital sentencing jury more, or is more likely to produce a sentence of death, than the likelihood of a defendant's return to the community.[5] And it is not at all probable that the jury was reassured by – or even believed – O'Dell's testimony that, because he was forty-four at the time of trial and "I got to do sixteen . . . years" for a "parole violation . . . I am never going to get out." *See* Resp. Br. 3.

Perhaps because the jury impact of possible parole in future dangerousness cases is overwhelming, no court anywhere, so far as we know, has held a *Simmons* error to be harmless. This case, in which "parole" was central to the prosecution's strategy for obtaining a death sentence, should not be the first.

B. The Vileness Verdict Did Not Render The Future Dangerousness Verdict Harmless

The Commonwealth argues that this is not just a future dangerousness case because the jury also found "vileness" as an aggravating factor. Resp. Br. 48. This argument is flawed for two reasons. First, as a matter of Virginia law, a vileness verdict will not be upheld when an accompanying future dangerousness verdict is invalid

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[5] *See Simmons*, 512 U.S. at 170 n.9 (plurality opinion) (collecting empirical evidence); Benjamin P. Cooper, Note, *Truth in Sentencing: The Prospective and Retroactive Application of* Simmons v. South Carolina, 63 U. Chi. L. Rev. 1573, 1573 n.2 (1996) (same).

under *Simmons*. Second, the Virginia Supreme Court has already in substance nullified the vileness verdict here.

In *Mickens v. Commonwealth*, 457 S.E.2d 9 (Va. 1995), the Virginia Supreme Court squarely rejected the Commonwealth's argument that a verdict of vileness makes *Simmons* error harmless. Mickens's death sentence, based on findings of both vileness and future dangerousness, had previously been affirmed by the Virginia Supreme Court on direct appeal. *Mickens v. Commonwealth*, 442 S.E.2d 678 (Va. 1994). This Court subsequently vacated that decision and remanded the case to the Virginia Supreme Court for reconsideration in light of *Simmons*. *Mickens v. Virginia*, 115 S. Ct. 307 (1994). On remand, the Virginia Supreme Court found that *Simmons* error had occurred, and did not find the error to be harmless, despite the existence of the vileness verdict. It directed a new trial on sentencing. 457 S.E.2d at 10. *Mickens* thus forecloses the Commonwealth from arguing that the *Simmons* error here was harmless.

Moreover, the vileness verdict in this case has been a dead letter for nine years. The Virginia Supreme Court, in affirming O'Dell's conviction and sentence, refused to consider his claim of error relating to the trial court's instruction on vileness, saying: "We need not rule on [it] because the jury did not base its verdict on the vileness predicate." 364 S.E.2d at 507. (J.A. 108.)

The Commonwealth now says that this statement was a "mistake[]." Resp. Br. 48 n.13. But when the Virginia Supreme Court's decision came down – when it seemed that the "mistake" would facilitate O'Dell's execution – the Commonwealth did not call the error to the

court's attention. And even now, in asking this Court in effect to correct the "mistake," the Commonwealth does not try to demonstrate that the vileness instruction given in O'Dell's case was proper. This by itself defeats this branch of the Commonwealth's harmless error claim. The vileness aggravator did not render the *Simmons* error harmless unless the verdict on vileness could have survived the appellate review it never received.

In any event, the Commonwealth's discovery of the Virginia Supreme Court's "mistake" comes far too late. The Commonwealth of Virginia, speaking through its highest court, determined in 1988 that O'Dell could be put to death on the basis of future dangerousness, and future dangerousness only. It is now clear that the determination cannot pass muster under the United States Constitution. The Commonwealth therefore invites this Court to review the decision of the Virginia Supreme Court to correct that court's "mistake," and permit the execution to proceed on a ground that the Virginia court never approved or reviewed. The Commonwealth's position is without precedent, and without support in fairness or logic.

CONCLUSION

For the foregoing reasons, and for those previously stated, the judgment of the court of appeals should be reversed, and the case remanded with instructions to grant the writ of habeas corpus.

Dated: March 12, 1997

Respectfully submitted,

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